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Nos. 03-1164, 03-1165

IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, ET AL.,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, ET AL.,
Respondents.

NEBRASKA CATTLEMEN, INC., ET AL.,
Petitioners,
v.
LIVESTOCK MARKETING ASSOCIATION, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN COTTON SHIPPERS ASS'N, THE ATLANTIC COTTON ASS'N, CALIFORNIA COTTON GROWERS, COTTON RESEARCH AND PROMOTION DEFENSE COUNCIL, DELTA COUNCIL, NATIONAL COTTON COUNCIL OF AMERICA, SOUTHERN COTTON ASS'N, SOUTHERN COTTON GROWERS, TEXAS COTTON ASS'N, TEXAS COTTON PRODUCERS AND WESTERN COTTON SHIPPERS ASS'N IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Under the Cotton Research and Promotion Act of 1966, as amended, 7 U.S.C. § 2101 *et seq.* ("Cotton Act"), domestic producers and importers of cotton are required to pay assessments similar to the beef-industry assessments at issue in this case. *Amici* are various entities involved in the cotton industry.

The American Cotton Shippers Association ("ACSA") is a trade association of primary buyers, mill service agents, merchants, shippers, exporters and importers of raw cotton. ACSA members handle over 80 percent of the United States cotton sold in domestic and export markets. ACSA members are also involved in the collection of fees assessed under the authority of the Cotton Act, and ACSA members have collected and remitted well in excess of one-half billion dollars to the Cotton Board. ACSA has itself directly contributed $200,000 to the cotton program. The Atlantic Cotton Association, Southern Cotton Association, Texas Cotton Association, and Western Cotton Shippers Association are federated associations doing business in seventeen states throughout the cotton belt. Members of these associations are also members of ACSA.

The California Cotton Growers Association, the Delta Council, the Southern Cotton Growers, and the Texas Cotton Producers are organizations comprised of individual cotton farmers or organizations that are themselves comprised of individual farmers. The National Cotton Council of America is a trade organization that provides a policy forum and

---

[1] The parties have given their written consent to the filing of this brief. In accordance with Rule 37.6, counsel for *amici curiae* state that no counsel for either party authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

serves as a government liaison for cotton ginners, warehousers, merchants, cottonseed crushers, cooperatives, and textile manufacturers. The Cotton Research and Promotion Defense Council was organized by cotton producers for the purpose of preserving and defending the constitutionality of the cotton research and promotion program.

The interest of *amici* in this case is substantial and immediate. *Amici* believe that the cotton program is both permissible as a matter of the First Amendment and vital as a matter of national policy. But the program is under constitutional attack, with challenges pending before the United States Department of Agriculture, *see In re Citetec*, CRPA Docket No. 04-0001, and the United States Court of International Trade, *see, e.g.*, *Cricket Hosiery, Inc. v. United States*, Court No. 03-00553. The *Cricket Hosiery* matter has been stayed pending this Court's resolution of the questions presented here.

SUMMARY OF ARGUMENT

The program established under the Cotton Act has led to critical advances in the cotton industry – advances that have allowed the cotton industry to overcome internal collective action problems and external competitive threats. By any measure, the cotton program must be deemed a success. Empirical data show that the program has not only increased consumer demand for cotton, but also reduced production costs and improved the quality of cotton products. As a result, all segments of the cotton industry and the consuming public of the United States have benefited substantially.

Under the decision below, the speech component of programs like the beef and cotton programs – under which a portion of an industry assessment is used to fund industry-wide promotional speech – is virtually *per se* invalid under the First Amendment. What the decision overlooks is the critical fact that the speech component of these programs is integrally related to the programs' research and development aspects. These are *not* programs, as the court below would

have it, that do "nothing more than commercial advertising." Pet. App. 28a. Rather, the advertising is linked inextricably to the research and development, so that when the cotton program, for instance, helps to develop an innovation like "wrinkle-free" cotton, it is able to communicate and capitalize on that breakthrough. Properly understood, these are programs that address collective action problems by requiring industry participants to contribute to an integrated effort to research, develop, *and* promote the relevant product for purposes of strengthening an entire industry.

Amici agree with petitioners that the promotional speech in question constitutes "government" speech that raises no First Amendment concerns. But even if this Court disagrees, the beef and cotton programs, and programs like them, should be upheld for two independent reasons. First, under the *Abood-Keller* line of cases, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Keller v. State Bar of California*, 496 U.S. 1 (1990), the programs are permissible in their entirety because their speech components are "germane" to the broader non-speech related goals of the programs. The Court of Appeals mistakenly concluded that the standard applicable under *Abood* and *Keller* is indistinguishable from the intermediate scrutiny that generally governs commercial speech regulations under *Central Hudson*. Pet. App. 19a-20a; *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). In fact, the "germaneness" inquiry under *Abood-Keller* is distinct from, and logically antecedent to, any inquiry under *Central Hudson*.

Second, even assuming that *Central Hudson* governs, programs like the beef and cotton programs easily survive First Amendment scrutiny. They neither restrict the flow of commercial speech to consumers nor compel identification with ideological causes, the traditional vices identified in commercial and compelled speech cases. Instead, they advance substantial governmental interests in sustaining industries crucial to the national economy, and do so by means

precisely calibrated to overcome the collective action problems that threaten those industries. Review under *Central Hudson* is of course fact-intensive, and even similar agricultural commodities programs may vary in ways that affect their First Amendment validity. But the cotton program, with which *amici* are very familiar, is a clear example of a program that readily meets the *Central Hudson* standard.

ARGUMENT

Like the Beef Act at issue in this case, the Cotton Act has been implemented to require industry participants to pay assessments under a regulatory scheme designed to strengthen the industry – in part by promoting pro-industry speech but also by, *inter alia*, funding vital research and development efforts. *See generally* 7 C.F.R. § 1205.510. Together, the Cotton Act and the administrative order promulgated under the Act[2] (collectively, the "Cotton Program") establish an integrated program combining research and advertising components to improve cotton products and promote those improved products to consumers.

The promotional speech generated by the Cotton Program – like the speech generated by the beef program – is properly deemed "government" speech that raises no First Amendment problem. *Cf. Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) ("when the State is the speaker, it may make content-based choices"). The generic advertising of cotton under the Cotton Program serves the public purposes identified by Congress, is confined to a

[2] The Cotton Research and Promotion Order ("Cotton Order") was issued on December 31, 1966. *See* Cotton Research and Promotion Order, 31 Fed. Reg. 16,757 (Dec. 31, 1966). Amendments to the Cotton Order were published on December 10, 1991, *see* Animal & Plant Health Inspection Service, 56 Fed. Reg. 6,426, 6,447 (Feb. 15, 1991), and approved in a referendum by cotton producers and importers, *see* Amendment to the Cotton Board Rules & Regulations, 57 Fed. Reg. 29,181 (July 1, 1992); Amendment to the Cotton Board Rules & Regulations, 57 Fed. Reg. 29,431 (July 2, 1992).

message specified by Congress, and is overseen by a government entity – the "Cotton Board" – created by Congress and subject to the supervision of the Secretary of Agriculture. That is enough to make it government speech and to bring it outside the traditional scope of First Amendment review altogether. *See* Brief of Petitioner Nebraska Cattlemen, Inc. ("Nebraska Cattlemen Br.") at 21-39; Petition for Certiorari of Secretary Veneman ("Veneman Petition") at 14-18.

But even assuming, *arguendo*, that the speech at issue is not "governmental" and thus implicates the First Amendment, the speech remains permissible for each of two independent reasons: because it is "germane" to a larger regulatory program, and because it satisfies the *Central Hudson* standard generally applicable to commercial speech regulation.

I. ASSESSMENTS MADE PURSUANT TO THE BEEF AND COTTON PROGRAMS ARE PERMISSIBLE UNDER *ABOOD* AND *KELLER*.

A. Under *Abood* and *Keller*, The Government May Compel Financial Contributions To Speech That Is "Germane" To A Broader And Non-Speech Related Regulatory Purpose.

The financial contributions compelled by the beef and cotton programs are integral parts of broad regulatory schemes that further underlying, non-speech related purposes. That sets them apart from the contributions invalidated by this Court in *United States v. United Foods, Inc.*, 533 U.S. 405, 415 (2001), which financed nothing more than the advertising speech in question, and brings them squarely within the permissible scope of government regulatory action delineated in cases like *Abood* and *Keller*.

1. At issue in *Abood* was state legislation permitting "agency shop" agreements under which all employees represented by a union, even if not themselves members, were assessed a "service fee" in the same amount as union dues. 431

U.S. at 211. A group of employees argued that the mandatory service fee violated their First Amendment rights by compelling them to contribute financially despite their "ideological[,] . . . moral or religious" objections to both "unionism itself" and specific collective activities undertaken by the unions. *Id.* at 222.

The Court rejected the employees' First Amendment claim and sustained the compelled financial contributions. Recognizing the "incentive that employees might otherwise have to become 'free riders'" – that is, to "refuse to contribute to the union while obtaining benefits . . . that necessarily accrue to all employees," *id.* – the Court balanced the intrusion on employee speech interests against the critical role played by "agency shop" agreements in advancing the larger "system of labor relations" established by federal law. *Id.* at 209, 211. Ultimately, the Court concluded, the balance tipped in favor of Congress's regulatory objectives, at least so long as the compelled contributions were used to fund activities "germane" to the union's larger role in the labor relations scheme. *Id.* at 235.

The Court applied the same "germaneness" standard when it considered an analogous challenge in *Keller*. There, members of a state bar association argued that use of mandatory bar dues to finance certain "ideological or political activities to which they were opposed" violated the First Amendment. 496 U.S. at 4. Again, the Court rejected the challenge. Noting the same "free rider" problem it had identified in *Abood*, *id.* at 12, the Court held that the state's larger interest in regulating the legal profession and improving the quality of legal services justified compelled assessments "germane" to those goals, *id.* at 13-14.

2. In *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 474 n.18 (1997), the Court expressly invoked the *Abood-Keller* "'germaneness' test" in reviewing the constitutionality of fees assessed pursuant to an agricultural commodities program much like the one at issue here. The Court

held that compelled contributions for generic advertising did not violate the First Amendment because the advertising was "germane" to the larger purposes of the government program. *Id.* at 473. Indeed, applying *Abood* and *Keller*, the Court concluded that the contributions in question were significantly *less* objectionable than those in its prior "germaneness" cases, because they did not compel support of any "political or ideological" view. *Id.* at 469-70 & n.14.

Importantly, the Court made clear in *Glickman* that the "germaneness" test it was applying was different from, and less rigorous than, *Central Hudson*'s intermediate scrutiny. The court below appears to have believed that there is no material difference between review under *Abood-Keller* and review under *Central Hudson*. App. 19a-20a. But *Glickman* expressly *rejected* application of *Central Hudson* once the "germaneness" standard had been satisfied, in favor of the more generous "standard appropriate for the review of economic regulation." 521 U.S. at 469.[3] It is true that there may be some overlap between the two analyses; the promotional activities of the Cotton Program, for instance, are "germane" to a larger regulatory interest for some of the same reasons they are permissible under *Central Hudson*. *See infra* at 16 - 26. But after *Glickman*, at least, it is clear that the two inquiries are distinct, and that a program that meets the "germaneness" standard of *Abood-Keller* need not be subjected to heightened scrutiny under *Central Hudson*.

The Court applied the "germaneness" test again to an agricultural commodities program in *United Foods*, this time finding that the germaneness condition was not met. In *United Foods*, the Court was confronted for the first time with a "marketing scheme" whose *only* object was to "generate the very speech to which some [compelled participants]

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[3] *See also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1457 (1989) ("germaneness" test and "means-end" review "serve different functions").

object." 533 U.S. at 415; *see also id.* ("The *only* program the Government contends the compelled contributions serve is the very advertising scheme in question.") (emphasis added); *id.* at 418 (Stevens, J., concurring) (case "raise[d] the open question whether such compulsion is constitutional when *nothing more* than commercial advertising is at stake") (emphasis added). Indeed, the Solicitor General appears to have conceded that point, arguing that the "generic advertising program alone" was permissible. Brief for the Petitioners, *United States v. United Foods, Inc.*, No. 00-276, at 25, 29.

Because the program served no larger, non-speech related purpose, the Court held, there was nothing to which the speech could be deemed "germane." "Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance." 533 U.S. at 415. Instead, there must be some reason, independent of the speech itself, that justifies the compelled association in the first place; only then does the germaneness inquiry become meaningful. *Id.* at 413-14.

3. The standard coming out of *Abood-Keller*, as refined by *Glickman* and *United Foods*, is clear: compelled contributions for speech activities are permissible under the First Amendment so long as the speech is "germane" to an independent, non-speech related purpose. It is only compelled funding of speech for its own sake that is subject to a different analysis under *United Foods*.

To the extent there is any confusion on this point, it flows from the fact that the Court in *Glickman* also relied on a separate and independent rationale for sustaining the commodities program at issue: the "collectivist" goals of the statutory scheme. 521 U.S. at 474-77. That determination, however, comes only after the Court has concluded already that germaneness under *Abood* is sufficient grounds for upholding the contributions. *Cf. id.* at 469-74. And though *United Foods* does address (as it must) both of *Glickman*'s alternative rationales in the course of invalidating a commodities program, it does not hold or even suggest that "collectivization" has somehow become a prerequisite to constitutionality under the *Abood-Keller* line of cases.[4]

B. The Speech Aspects Of The Beef And Cotton Programs Meet The "Germaneness" Test Of *Abood* And *Keller*.

The court below purported to apply the *Abood-Keller* line of cases. Pet. App. 18a-19a. Where it went critically wrong, however, was in its determination that the beef program does "nothing more" than commercial advertising, so that it is materially identical to the program invalidated in *United Foods*. *Id.* at 28a. In fact, the beef program, like the Cotton Program, combines promotional speech aspects with substantial research and development components. *See* Veneman Petition at 29-30; Brief for Petitioner Nebraska Cattlemen at 13-14.[5] But even if a particular research and promotion program

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[4] Even if a "collectivist" statutory scheme were required by the First Amendment – which it is not – programs like the Cotton Program should survive review. Since the Great Depression, the United States government has actively regulated the cotton industry, using mechanisms ranging from tariffs and quotas to marketing restrictions, acreage allotments, set-asides, acreage limitation programs, price supports, direct payments, commodity loans, income support payments, and other subsidies. Brian C. Murray *et al.*, Research Triangle Inst., *An Economic Analysis of the Cotton Research and Promotion Program* 3-16 to 3-17 (2001). In exchange for complying with federal regulations, cotton producers receive the *quid pro quo* of valuable federal subsidies and have participated in industry-wide production adjustment programs. *See, e.g.*, 7 C.F.R. § 1427.5 (conditions for receipt of subsidies in form of "nonrecourse" loans). That kind of intensely regulatory and cooperative program reflects the same "collectivist" purposes as the commodities program in *Glickman*. *See* 521 U.S. at 474-77. But in any event, and more important here, it takes the Cotton Program *outside* the "speech-only" limitation established by *United Foods*. *See* 533 U.S. at 415.

[5] At the petition stage of this case, the Solicitor General took the position that the "*Abood-Keller* analysis cannot provide a basis for sustaining programs of compelled funding exclusively *or primarily* for generic advertising and promotion." *See* Veneman Petition at 24 n.7 (emphasis

could be described as involving "nothing more" than speech for its own sake, *cf. United Foods*, 533 U.S. at 418 (Stevens, J., concurring), the Cotton Program could not. The speech element of the Cotton Program is not only "germane" to, but also integrally linked with, a much broader research and development agenda, all for the non-speech purpose of strengthening an economically critical industry.

1. The Cotton Act and the Cotton Program were designed to and do advance a significant non-speech related purpose: strengthening a critical industry severely threatened, and doing so in a way that should reduce industry reliance on government controls and subsidies.

There can be no question but that the cotton industry is critical to the national economy. In adopting the Cotton Act, Congress concluded as much: "The efficient production of cotton and the maintenance and expansion of existing markets and the development of new or improved markets and uses is vital to the welfare of cotton growers and those concerned with marketing, using, and processing cotton *as well as the general economy of the Nation*." 7 U.S.C. § 2101 (emphasis added).

It is equally clear that at the time the Cotton Act was passed in 1966, the cotton industry was in crisis. From 1930 to 1960, the cotton share of the total domestic fiber markets dropped from 85 percent to 65 percent; between 1960 and 1966 it dropped even more sharply, down to 53 percent. *See* S. Rep. No. 89-1272, at 4 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2479, 2482. The principal cause was clear:

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added). To the extent that the Solicitor General reads *United Foods* as invalidating compelled contributions to any program of which generic advertising is some part – even a substantial part – *amici* disagree. *United Foods* dealt only with programs devoted *exclusively* to speech activities. *See supra* at 7-8. The validity of the beef program, which, like the Cotton Program, combines promotion with research to serve non-speech related ends, is not foreclosed by *United Foods*.

the external competitive threat posed by "noncellulosic," or "synthetic" fibers. At the same time that cotton's market share was declining, synthetic's share was increasing at roughly the same rate. Timothy Curtis Jacobsen & George David Smith, *Cotton's Renaissance: A Study in Market Innovation* 198 fig.8 (2001).

Faced with this crisis, Congress determined that neither production and marketing restrictions nor subsidies, which had already been provided in "high and rising" amounts, would be enough. S. Rep. No. 89-1272, at 11, *reprinted in* 1966 U.S.C.C.A.N. at 1489. Production and marketing adjustment programs and subsidies are principally supply-side measures, and as such, Congress concluded, did not offer the industry's best hope for either reducing production costs or increasing consumer demand. *Id.* Indeed, Congress hoped that the Cotton Act would not only obviate the need for additional subsidies, but actually help to "reduce or eliminate the need for . . . supporting the price of cotton" through subsidization. *Id.* at 6-7, *reprinted in* 1966 U.S.C.C.A.N. at 2484-85. As Representative Resnick explained, "[T]he Federal Government has a bigger stake in cotton than in any other agricultural commodity. We must do something about reducing this stake. I know of no better way [than the Cotton Act]." 112 Cong. Rec. 4,837 (1966).

The underlying purposes of the Cotton Act – saving the cotton industry, and transitioning away from heavy industry dependence on production and marketing restrictions and costly subsidies – have nothing to do with speech and everything to do with purely economic regulation, properly subject to the *Abood-Keller* standard. *See Glickman*, 521 U.S. at 469 (applying "standard appropriate for the review of economic regulation"). The fact that the *means* to Congress's end involves a speech component does not change the analysis. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), for instance, the Court considered a "must-carry" rule that compelled cable operators to serve as conduits for broad-

cast speech. But the Court declined to impose the strict scrutiny generally applicable to such content-based speech regulations because the *purpose* behind the rule was economic: saving the broadcast industry from the threat posed by cable. *Id.* at 659 ("Congress granted must-carry privileges to broadcast stations on the belief that the broadcast television industry is in economic peril due to the physical characteristics of cable transmission and the economic incentives facing the cable industry. Thus, the fact that the provisions benefit broadcasters and not cable programmers does not call for strict scrutiny under our precedents."). As this Court later explained, "[t]he Government's interest . . . was not the alteration of speech, but the survival of speakers." *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 577 (1995). Here, too, the economic purposes behind the Cotton Act bring it squarely within the *Abood-Keller* rule.

2. The speech component of the Cotton Program is "germane" to the Program's larger regulatory ends. Indeed, the promotional speech funded by the Cotton Program works hand in glove with research and development efforts – financed by the same assessments – to serve the non-speech related interest of advancing the cotton industry.

From the start, it has been clear that the Cotton Program is about more than increasing consumer demand through advertising. Rather, advertising is just one element in a coordinated campaign that also works to improve the quality of cotton products and lower the costs of cotton production. As the Act itself provides, assessments are intended to "carry[] out an effective and continuous coordinated program of research and promotion." 7 U.S.C. § 2101; *see also* 112 Cong. Rec. 4,816 (1966) (statement of Rep. Cooley) ("[W]e need more money for promotion and research. We want to reduce the cost of producing this fiber. We want to make it more attractive and more durable so the consumer can profit."). And the Cotton Order requires the Cotton Board to "establish[] and

carry[] on . . . research and development projects and studies with respect to the production, ginning, processing, distribution, or utilization of cotton and its products . . . ." 7 C.F.R. § 1205.333(b). The Cotton Board, in turn, has consistently emphasized research and development projects. *See* Jacobsen & Smith, *supra*, at 140. Indeed, in 1999, the Cotton Board opened a $19 million research center in Cary, North Carolina that is equipped with the latest technology for conducting cotton agriculture, fiber, and textile research and development.

The research and development aspects of the Cotton Program have been extraordinarily successful. To take only a few examples, assessments under the Cotton Program have helped develop pest-resistant cotton, wrinkle-free cotton, stretch fabrics, and flame-resistant cotton. The Cotton Program has also been responsible for stimulating production improvements: improvements in fiber quality and processing, fabric production, fabric development, cotton seed research, and ginning technology research. *See id.* at 218-31, 234-51 262-71; Oral Capps, Jr. *et al.*, Dep't of Agric., Tex. A&M Univ., *Economic Evaluation of the Cotton Checkoff Program* 14-15 (1996); Cotton Inc., 2003 *Annual Report* 16 (2004);[6] Cotton Inc., 2002 *Annual Report* 10-12 (2003); Cotton Inc., 2001 *Annual Report* 11-12 (2002). All of those developments have been assisted substantially by the Cotton Program, and some would likely not have occurred without it.

The influence of the Cotton Program has been critical in helping to tie together a market that is geographically dispersed and comprised of numerous small producers. The Cotton Board serves as a "true clearinghouse for scientific information" and a means of "disseminating practical know-how to growers nationally." Jacobson & Smith, *supra*, at

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[6] An executive summary of the report is available at http://commodity.aem.cornell.edu/nicpre/newslet/vol3no2/pg2.htm.

239.[7] The Cotton Board's efforts (directly and through its contractors) have helped tie together other less comprehensive research efforts and have helped ensure that cotton research is focused on the long-term and is broadly based.

The speech aspect of the Cotton Program works in tandem with the research and development efforts, functioning as the "primary conduit" through which new advances "reach cotton consumers." Murray, *supra*, at 2-9. Some of the results generated by the Program's research efforts would have achieved their purposes apart from any advertising. Others – those geared more to consumers, such as wrinkle-free and stretch cottons – depend on a coordinated promotional campaign for their success. In that broad class of cases, promotion and research and development function as integrated and mutually-reinforcing aspects of a single program: the availability of a promotional campaign creates additional incentives to develop new and improved cotton products, and the research and development work financed by the Cotton Board generates advances worthy of broad dissemination. *Cf.* Jacobsen & Smith, *supra*, at 140 (Cotton Board has avoided "overpromot[ing]" what the industry "could not yet produce").

Congress, of course, could have established a cotton program that did not include a speech component – but that would only have undermined its substantial non-speech interest in advancing the cotton industry by improving its processes and products. Nothing in *United Foods* or any other case requires that counter-productive result. The promotional aspect of the Cotton Program is not only "germane" but critical to achievement of the Program's larger and non-speech

[7] The Beef Board has served a similar function, coordinating significant research and educational efforts. *See* Nebraska Cattlemen Br. at 13-14.

related purposes. Under *Abood* and *Keller*, that is sufficient to make it permissible under the First Amendment.[8]

3. The Cotton Program is on all fours with the programs sustained in *Abood* and *Keller* in another respect, as well. In both those cases, the Court recognized the "free rider" problem that necessitated mandatory collective action: without compelled assessments, individual participants would have every incentive to withhold contributions and then profit from the generalized benefits produced by the program. *Abood*, 431 U.S. at 222; *Keller*, 496 U.S. at 12. Congress made precisely the same determination with respect to the Cotton Act, concluding that collective action induced by "uniform[]" federal legislation was necessary to advance its economic interests. *See, e.g.*, S. Rep. No. 89-1272, at 3, *reprinted in* 1966 U.S.C.C.A.N. at 2481.

Congress was right. At the time the Cotton Act was passed, there were hundreds of thousands of different domestic cotton producers. *See id.* None of those small producers had an incentive, on its own, to invest sufficient resources to pursue effective research and development programs. The synthetic market, by contrast, was highly concentrated, with the eight largest firms controlling 90 percent of the market. *Id.* at 3, 6, *reprinted in* 1966 U.S.C.C.A.N. at 2481, 2484. As a result, large synthetic firms devoted significant resources to research and promotion, which together amounted to $205 million (of which $135 million went to research) in 1965 alone. *Id.* at 6, *reprinted in* 1966 U.S.C.C.A.N. at 2484. The "combined public and private outlays for development and promotion of cotton," on the other hand, amounted to less than 15 percent of that amount. *Id.*

[8] The Cotton Program (like the beef program) presents no question as to whether a minimal research and development effort may be used as a kind of "fig leaf" to protect a program that is in actuality all about advertising. Research and development has historically been a substantial part of the Cotton Program's budget, as well as a significant and successful part of its output. *See supra* at 12-13.

With full understanding of those facts, Congress concluded that purely private efforts by cotton industry participants were unlikely to yield the kind of research, development, and promotion required to save the industry from the threat posed by synthetics. Instead, Congress determined that a federal program was required in order to overcome internal market failures so that thousands of small cotton producers could survive against their larger and more concentrated rivals. *See* 7 U.S.C. § 2101 ("The production and marketing of cotton by numerous individual farmers have prevented the development and carrying out of adequate and coordinated programs of research and promotion."); *see also* S. Rep. No. 89-1272, at 3, *reprinted in* 1966 U.S.C.C.A.N. at 2481 (noting that prior self-help efforts by the industry had failed). That kind of economic regulatory decision is well within Congress's purview under *Abood* and *Keller*.

II. THE BEEF AND COTTON PROGRAMS MEET THE *CENTRAL HUDSON* STANDARD FOR COMMERCIAL SPEECH REGULATION.

This Court has not previously applied *Central Hudson* to cases like this one, involving compelled financial contributions to commercial promotional programs. *See Glickman*, 521 U.S. at 474; *United Foods*, 533 U.S. at 410 (unnecessary to reach question whether *Central Hudson* applies). The case does not implicate the traditional speech interests at issue in commercial speech or compelled speech cases: nothing about the promotional component of the beef program (or the Cotton Program) restricts the flow of commercial speech to consumers, or compels identification with ideological or political causes. *See infra* at 20-21. A more forgiving form of First Amendment review may therefore be appropriate. *See Zauderer v. Office of Disciplinary Counsel of Supreme Ct.*, 471 U.S. 626, 651 (1985) (although commercial disclosure requirements "implicate" the First Amendment, an "advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest").

At the very most, however, the compelled financial contributions at issue under the beef and cotton programs warrant application of intermediate scrutiny under *Central Hudson*. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (reaffirming that *Central Hudson* governs commercial speech restrictions). Under that standard, truthful and nonmisleading commercial speech may be regulated so long as the regulation (1) serves a substantial governmental interest, (2) directly advances that interest, and (3) is not more extensive than necessary to serve the interest. *Cent. Hudson*, 447 U.S. at 566. In order to satisfy the second and third prongs of this test, there need only be a "reasonable" and not a "perfect" fit between the identified problem and the government's solution; *Central Hudson* is not equivalent to a strict scrutiny or "least restrictive means" test. *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989). Programs like the Cotton Program easily pass review under *Central Hudson*.

1. The governmental interests underlying the Cotton Act – preservation of the cotton industry and decreased dependence on government production limitations and subsidies – are "substantial" for *Central Hudson* purposes. Those interests, as well as the dire condition of the cotton industry when the Cotton Act was passed in 1966, are described in Part I.B. above. *See supra* at 10-11. The industry in 1997 employed over 440,000 individuals and generated an annual revenue of $40 billion. *See* Murray, *supra*, at 3-1. It thus remains the case that "maintenance and expansion" of existing markets and "development of new or improved" cotton products and processes is "vital" not only to the cotton industry but also to the "general economy of the Nation." 7 U.S.C. § 2101.[9]

2. The "fit" between the Congress's goals and the Cotton Program it employed to meet them is more than "reason-

[9] The beef program at issue in this case serves comparable interests in ensuring the health of the beef industry and thus protecting the nation's economy as a whole. *See* Nebraska Cattlemen Br. at 40.

able." *Cf. Fox*, 492 U.S. at 480. The very success of the Program in achieving its stated purposes compels that conclusion. As described above, the research and development efforts undertaken by the Cotton Board have fostered numerous advances in both cotton production and the quality of cotton products. *See supra* at 13-14. Together with the substantial and coordinated promotional efforts undertaken by the Cotton Board, those advances have had precisely the intended effect: they have allowed the industry to regain market share and compete on a more equal footing with synthetic fibers. *See generally* Murray, *supra*, at ES-11 ("strong and positive effect" on demand for cotton). After reaching a market-share low of 34 percent in 1973, cotton has enjoyed a steady increase in market share to approximately 60 percent of the consumer apparel and home furnishings markets in 1997. Jacobson & Smith, *supra*, at 198 fig.8. And there should be no question but that much of that resurgence is a direct result of the Cotton Program; outside the United States, cotton's market share has continued to erode since 1973.[10]

The benefits of the Cotton Program have accrued to cotton producers and the United States government alike. By improving cotton production processes and reducing production costs, the Cotton Program has directly benefited cotton producers. By increasing demand for improved cotton products, the Cotton Program has, as Congress expected, increased producers' revenues while at the same time substantially reducing the necessity for production and marketing adjust-

[10] "The United States has been the world leader in generic cotton promotion since the 1960's. The larger [non-price components for demand] estimates for North America indicate a fairly consistently larger role for permanent change compared with other developed regions." Stephen McDonald, Econ. Research Serv., U.S. Dep't Agric., *Global End-Use Demand for Cotton: A Time-Varying Parameter Model* 280, *in* 1 *Proceedings of the Beltwide Cotton Conference* 278-82 (Nat'l Cotton Counsel 1997).

ment programs and significantly affecting the nature and scope of federal government subsidies.[11] In short, the Cotton Program has materially achieved its goals. *See Cent. Hudson*, 447 U.S. at 566 (commercial speech regulation permissible where it "directly advances" asserted interests).

3. The "fit" inquiry also asks whether the government's response to a perceived problem is "'proportion[al]'" – that is, whether it impinges unnecessarily broadly on speech interests. *See Fox*, 492 U.S. at 469 (citation omitted); *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995) (commercial speech regulation must be "narrowly drawn" to achieve its purpose). The speech aspect of the Cotton Program is entirely proportional to the problem presented: it

[11] *See* H.R. Rep. No. 100-339, at 11 (1987) (letter from Edward M. Gramlish, Acting Director, Cong. Budget Office) ("It is likely that increased promotional expenditures by the Cotton Board would increase domestic cotton consumption, and therefore reduce [Commodity Credit Corporation] expenditures for its cotton program."). The effect of the Cotton Program on federal government subsidies depends in part on the price of cotton. Under the federal marketing loan program, producers repay loans at the lower of the specified loan rate or a market price determined by the USDA. As the price of cotton increases towards that loan rate, producers repay progressively larger amounts to the government that they would otherwise not have to repay. For example, using the 2002-03 loan rate of 52 cents per pound, and applying average acreage and yields, we can calculate that for prices below 52 cents per pound a 1-cent increase would be expected to save the government $85 million per year in marketing loan costs. *See* 7 U.S.C. §§ 7914(c)(4), 7932(a)(6).

The Cotton Program also affects the need for production and marketing restrictions. The Agriculture Act of 1949 – the seminal statutory authority for the United States cotton program – authorizes not only very high levels of subsidization, but also marketing and planting restrictions. Those restrictions were commonly imposed throughout the 1950s and early 1960s. But as the demand for cotton and cotton products increased, Congress was able to suspend temporarily many of the 1949 Act's most onerous restrictions in favor of less restrictive subsidy programs with different levels of support. *See, e.g.*, S. Rep. No. 91-1154, at 4799 (1970) (statement of Sen. Ellender).

impacts speech interests only peripherally, and is precisely tailored to the collective action problem it addresses.

a. Like the beef program, the Cotton Program has only an indirect and minimal impact on cognizable speech interests. None of the concerns underlying this Court's commercial speech doctrine are even implicated by either program. Congress did not, in adopting the Cotton Act, seek to restrict the flow of information to the public in a paternalistic effort to prevent "bad choices." *Cf. 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). Indeed, the Cotton Program does not for any reason restrict the flow of information to the public – the principal vice at which commercial speech doctrine is aimed. On the contrary, the Program disseminates information to consumers, thus furthering the First Amendment interest in public access to commercial information. "Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides," compelled commercial speech simply does not raise the same First Amendment concerns as restrictions on commercial speech. *Zauderer*, 471 U.S. at 651 (affirming commercial disclosure requirement; "constitutionally protected interest in not providing any particular factual information in . . . advertising is minimal").

The speech interests ordinarily protected by the compelled speech doctrine are not implicated here, either. The cotton and beef programs do not require participants to speak, but only to make financial contributions. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (compelled flag salute and pledge required "affirmation of a belief and an attitude of mind"). That financial contribution is not used to convey an "ideological" message, but only a "commercial" one. For that reason, the intrusion on speech

interests here is even less significant than that in *Abood* and *Keller*. *See Glickman*, 521 U.S. at 469-70 & n.14. Finally, there is no serious risk that the promotional efforts undertaken by the Cotton Board or its beef counterpart will be perceived as speech of or endorsed by any one particular producer. *Cf. Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (no First Amendment violation where, *inter alia*, "views" expressed by speaker "will not likely be identified with" objector).

b. Any marginal intrusion on speech interests occasioned by the Cotton Program's compelled assessments is narrowly tailored to the problem before Congress. As explained above, what Congress faced when it established the Cotton Program was a classic market failure: no one of the hundreds of thousands of small cotton producers had any incentive to contribute to research, development and promotion efforts that would produce generalized benefits for the industry as a whole. For that reason, Congress found, any program founded on purely voluntary efforts was likely to fail. *See supra* at 15-16; *cf. Turner Broad.*, 520 U.S. at 195-96 (in considering fit under intermediate scrutiny, courts should give substantial deference to legislative conclusions that inform regulatory decisions). And while Congress could in theory have simply decided to fund a cotton program entirely by itself, that would undermine, not further, its goal of reducing industry reliance on government intervention and subsidies. *See supra* at 11.

Even so, Congress made every effort to accommodate potential objectors when it passed the Cotton Act. In its original form, the Cotton Act's provisions were "voluntary" in that any producer could seek a refund of an assessment. The Act also exempted from its coverage cotton grown abroad and imported into the United States. Cotton Research and Promotion Act, § 3, Pub. L. No. 89-502, 80 Stat. 279, 280 (1966). But in 1990, Congress determined that the "voluntary" nature and narrow scope of the Cotton Program were

threatening its success, as the percentage of producers utilizing the refund procedure grew from 10 percent in 1976 to 35 percent by the late 1980s. The culprit, Congress concluded, was not any sense among producers that the Program was failing to assist the industry, but rather the "free rider" problem that had dogged the industry from the start: producers were becoming increasingly aware that *other* producers were opting out of or exempt from the Program, and enjoying the Program's benefits without incurring any of its costs, and hence increasingly resistant to carrying their own share. *See Research and Promotion Proposals Introduced in this Congress: Hearing Before the Senate Subcomm. on Domestic and Foreign Mktg. and Prod. Promotion of the Comm. on Agric., Nutrition and Forestry*, 101st Cong. 40 (1989) (statement of W. Bruce Heiden, President, National Cotton Council of America). It was only at that point – having tried and failed with a narrower program – that Congress finally eliminated the refund procedure and extended the assessments to importers of foreign cotton subject to taxation. *See* Cotton Research and Promotion Act Amendments of 1990, Title XIX, Subtitle G, Pub. L. No. 101-624, 104 Stat. 3359, 3909-14 (1990). The current scope of the Cotton Program is thus precisely tailored to the "free rider" problem it seeks to resolve.[12]

3. Against that strong case for the First Amendment validity of programs like the beef and cotton programs, challengers raise one principal objection: they do not want to contribute to a "generic" pro-industry message. In the cotton case pending before the Department of Agriculture, for example, the challenger has asserted that it "does not wish to support" a "generic message" that "cotton is better than other fibers." *See* Emergency Petition to Correct Constitutional

[12] The history of the beef program shows a similar congressional concern with a "free rider" problem in the beef industry, and similarly calibrated efforts to address that concern. *See* Nebraska Cattlemen Br. at 43-44.

Violation, *In re Citetec*, No. CRPA 04-0001, ¶¶ 6, 16 (U.S. Dep't of Agic. filed Nov. 7, 2003) ("Emergency Pet."). That basic objection generally takes one of two forms. Some challengers argue that such programs "interfere[] with the promotion efforts of individual firms by depleting and wasting scarce resources and by sending a competing message to consumers," *id.* at ¶ 19; others, that they disagree with the content of the "generic" message to the extent it suggests that all forms of the product are alike.[13] In either form, the objection is fundamentally misplaced.

The first argument, that agricultural commodity programs interfere with the advertising efforts of individual participants, is based largely on the unstated assumption that assessments paid under the programs reduce the money available to participants to support their own commercial speech. That is provably false. With respect to the Cotton Program, for instance, expert empirical data show that the "return on investment" in the Program has far exceeded one-to-one.[14] At the mill level, for example, the net return for the Program has been in the range of $7.12 to $8.14 per dollar of investment; at the cotton producer level, the net return has been $3.23 to $3.49;[15] and for importers, $3.63 to $4.33. Capps,

[13] That objection can be taken to absurd extremes. In the beef-program litigation below, for instance, plaintiffs objected to generic advertising for steak on the ground that their product is not steak but cattle – the same cattle, of course, from which steak is ultimately produced. *Livestock Mktg. Ass'n v. U.S. Dep't. of Agric.*, 207 F. Supp. 2d 992, 1002 (D.S.D. 2002) (plaintiffs who sell live cattle "object to having to pay for the advertisement of steak, which is not the product that they sell").

[14] The beef program has likewise generated a positive return to its participants. *See* Affidavit of Ronald W. Ward at 13, Joint Appendix ("J.A.") 172 (beef program has resulted in average net gains of $5.67 per dollar of investment).

[15] Depending on the actual price of cotton in any given year, net returns from the Program will not necessarily translate into an increase in gross income for cotton producers, because the rate at which producers

supra, at iii. Far from "depleting and wasting scarce resources," *cf.* Emergency Pet. ¶ 19, the Cotton Program has provided a return on investment that should fully permit participants so inclined to engage in their own advertising.

That has not happened for a reason that goes directly to the validity of the objections to the Cotton Program. However much Program participants may claim they "disagree" with the "generic" message of the Program's promotional efforts, they have historically made little effort (particularly at the producer level) to distinguish, or "brand," their own cotton. And the problem is not the Cotton Program, but the very structure of the industry: because the total market is spread across so many thousands of participants, individual participants rarely have any significant incentive to invest in individual product branding. *See* Affidavit of Ronald W. Ward at 3-4, J.A. 168-69 (producers of agricultural goods are unable to effectively communicate with public absent industry wide program due to small market share per producer and negligible differentiation between product of each producer).

In any event, an individual participant is free to disassociate itself from the Cotton Board's speech if it so desires. Nothing in the Cotton Program either restricts commercial speech or in any way restrains participants from disagreeing with the content of the Cotton Board's generic advertising. If, for example, a participant disagrees with the "generic" content of the Program's promotions because it believes that its own product is superior, then the participant is free to make that claim. Indeed, by benefiting the participant financially, the Cotton Program actually *enhances* the participant's ability to differentiate its product through branding and separate advertising. The fact that such differentiation does not generally occur at the participant level is a result of structural industry conditions, not the Cotton Program.

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must repay federal marketing loans depends upon the price of cotton. *See supra* at 19 n.11.

At bottom, the central objection to the Cotton Program, the beef program, and other programs like them is exactly the one this Court rejected in *Abood*: some participants wish to ""withdraw [their] financial support" because they "disagree with the group's strategy" or simply because they want to keep their money. *See* 431 U.S. at 223 (quoting *Int'l Ass'n of Machinists v. Streets*, 367 U.S. 740, 778 (1961)); *see also* Emergency Pet. ¶¶ 6, 16, (cotton is "so diverse that no single generic program" can properly promote it).[16] But the decision as to how to best regulate the cotton industry is Congress's to make. *Cf. Lochner v. New York*, 198 U.S. 45, 75 (1905) ("a constitution is not intended to embody a particular economic theory") (Holmes, J., dissenting). And the unwillingness of some participants to contribute to promotional speech that is a critical part of an inarguably successful program is nothing more than proof of the very collective action problem that demanded passage of the Cotton Act in the first place.

4. As demonstrated by the discussion above, review under *Central Hudson* is decidedly fact-specific, requiring thorough consideration of a record, assessment of the specific contours of a program or regulation, and careful balancing of particular governmental interests against particular speech interests. *See Cent. Hudson*, 447 U.S. at 563 ("protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation"); *Turner Broad.*, 512 U.S. at 668 (remanding for development of "more thorough factual

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[16] Any significant disagreement with Cotton Board strategy may be addressed through an industry referendum; any amendment to the Cotton Program must be approved by a majority vote. *See* 7 U.S.C. § 2107(a). And the Cotton Board itself is composed of members from every cotton-producing state, as well as from eligible importer organizations, *see* 7 C.F.R. § 1205.324, and roughly reflects the proportion of domestic cotton producers to importers. There is thus no concern that the Board does not fairly reflect the interests of the cotton industry as a whole.

record"). It would be impossible for a single bright-line rule under *Central Hudson* to take account of the material differences among agricultural commodity programs, and the Court should take care, if it applies *Central Hudson* in this case, to do so in a way that is sensitive to those differences.

The Cotton Program, for instance, has what is in many ways a unique history. It arises from decades of federal efforts to support the cotton industry through a complex regulatory regime and now functions as a critical component of that larger effort. *See supra*. The future of the Cotton Program, too, raises unique considerations. The federal government's cotton subsidies are now at issue in proceedings before a dispute panel of the World Trade Organization ("WTO"), which has issued an opinion that, though not public, is reportedly adverse to the United States. That decision will be appealed, and *amici* believe that the subsidies are fully consistent with United States trade obligations. But if those subsidies are determined to be contrary to United States treaty obligations within the WTO, then the Cotton Program will become even more critical to the very survival of the United States cotton industry. That kind of industry-specific fact should weigh importantly in striking the proper balance under *Central Hudson*.

CONCLUSION

The judgment should be reversed.

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